COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3166-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KINTE SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. Kinte Scott appeals from a judgment of conviction for possession of cocaine with intent to deliver pursuant to WIS. STAT.

§ 961.41(1m)(cm) (1999-2000).[1] In the trial court, Scott contended that the evidence obtained against him was the result of an illegal temporary detention followed by an unlawful arrest.[2] The trial court disagreed and denied Scott's motion to suppress the evidence. We agree with the trial court's rulings that Scott's temporary detention and later arrest were valid. Therefore, we uphold the court's denial of Scott's motion to suppress. We affirm the judgment of conviction.

Facts

¶2 The controlling facts as presented at the motion to suppress hearing are not in dispute. During the afternoon of February 6, 1999, City of Racine Police Officer Joseph N. Stevens was on patrol in a police vehicle when he received a dispatch call of "shots fired" in the 1600 block of Prospect Street in the city of Racine.[3] While en route to that location, Stevens received additional information from another officer already on the scene that a group of black males involved in the shooting was eastbound on Prospect Street. While still en route, Stevens received further dispatch information that this group consisted of approximately seven black males who were eastbound on Prospect Street at Martin Luther King Drive.

¶3 When Stevens arrived at Prospect Street and Martin Luther King Drive, he observed a group of approximately seven black males walking eastward through a parking lot. Upon seeing Stevens, one of the group, later identified as

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

[2] Following the denial of his motion to suppress, Scott pled guilty to the charge.

[3] Officer Steve Herold was on patrol with Stevens. Herold, however, did not testify at the hearing on the motion to suppress. Therefore, we refer only to Stevens' role in this event.

Scott, separated from the others and stopped at a pay phone. Stevens stopped and exited his vehicle. After other officers controlled the rest of the group, Stevens approached Scott, placed him in handcuffs and patted him down. Stevens told Scott that he took this action for his own safety because of the "shots fired" report. Stevens further advised Scott that the group was suspected in the "shots fired" report and that he wanted to identify the members of the group.

¶4 At this time, Officer Scott Leslie arrived on the scene. Leslie recognized Scott as a suspect in a battery and theft incident reported to Leslie a week earlier. Leslie had issued a warrant recommendation for Scott at that time.[4] Leslie directed Stevens to arrest Scott. Stevens did so and Scott was transported to the county jail. During the booking procedure, Scott was searched and drugs were found on his person.

¶5 The State charged Scott with possession of cocaine with intent to deliver pursuant to WIS. STAT. § 961.41(1m)(cm). Following the filing of the information, Scott moved to suppress the evidence obtained as a result of the police search at the county jail. Scott contended that Stevens did not have a reasonable suspicion to stop him pursuant to WIS. STAT. § 968.24, nor probable cause to arrest him pursuant to Leslie's directive. The trial court denied the motion to suppress. Scott then pled guilty to the charge and he appeals from the ensuing judgment of conviction.

[4] The record does not explain what a "warrant recommendation" is. We assume it means a request for an arrest warrant submitted to a judicial authority or to some agency within the police department for further transmittal to the judicial authority if the recommendation is approved. Regardless, the record is silent as to whether the recommendation was ever acted upon, and we assume for purposes of this opinion that no warrant for Scott's arrest was issued.

Focus of Our Review

¶6 Before addressing the merits, we examine Scott's approaches to the issues in the trial court. We do so because it bears upon how we approach both issues on appeal.

¶7 First, we address the temporary detention issue. The parties' appellate briefs represented that Stevens' response to the incident was based upon an anonymous tip. As a result, the parties debated whether the tip was sufficiently corroborated so as to justify Scott's temporary detention by the police. Among other authorities, the briefs addressed the Wisconsin Supreme Court's then recent opinion in ***State v. Williams***, 225 Wis. 2d 159, 591 N.W.2d 823 (1999), and the United States Supreme Court's later opinion in ***Florida v. J.L.***, 529 U.S. 266 (2000). After the parties' briefs were submitted, the State advised us by letter that the Supreme Court had vacated our supreme court's opinion in ***Williams*** and had remanded the matter to our supreme court for further consideration in light of ***J.L.*** *See* ***Williams v. Wisconsin***, 529 U.S. 1050 (2000). Based on that information, we placed this case on hold pending our supreme court's further decision in ***Williams***.

¶8 The supreme court has now issued its further decision in ***State v. Williams***, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, and we have again taken up this case. However, based upon our examination of the proceedings at the motion to suppress hearing, we disagree with the parties that this is an anonymous tip case. As our recital of the facts demonstrate, there is no direct evidence of any anonymous tip. The most that can be said is that Stevens initially received a dispatch of "shots fired." But the record does not reveal the source of this information. Even assuming that it came from an informant, the record is also silent as to whether the source was anonymous or identified.

¶9 In addition, while he was en route, Stevens received additional information regarding the incident from another officer who was already on the scene. This information reported that a group of black males was involved in the shooting and that the group was eastbound on Prospect Street. Clearly, this information did not constitute an anonymous tip. Finally, while still en route, Stevens received further information via a dispatch advising that the group consisted of approximately seven black males who were eastbound on Prospect Street at Martin Luther King Drive. As with the first dispatch, the record again does not reveal the original source of this information or whether the source was anonymous or identified. In short, the factual backdrop to this case does not support the premise of the parties on appeal that this is an anonymous tip case.

¶10 Our conclusion is borne out by the proceedings in the trial court. There, Scott presented a conventional ***Terry***[5] argument, contending that Stevens' observations when he arrived on the scene did not provide reasonable suspicion under WIS. STAT. § 968.24. At no time did Scott argue that the information imparted to Stevens was based upon an anonymous tip or that the information was not sufficiently corroborated. Nor did Scott cite to the supreme court's original decision in ***Williams*** or to any other law relating to anonymous tips.[6] The same is true as to the State's argument in response.

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[5] ***Terry v. Ohio***, 392 U.S. 1 (1968).

[6] In the trial court, Scott cited to ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), a "reasonable suspicion" case based entirely on a police officer's observations. ***Id***. at 53-54. Scott also cited to ***State v. Harris***, 206 Wis. 2d 243, 557 N.W.2d 245 (1996), where the police stopped a vehicle based upon a general description of a bank robbery suspect presumably provided by another. ***Id***. at 258-63. However, there is no indication in ***Harris*** that the person providing the description was anonymous, and the decision does not allude to any law addressing anonymous tips.

¶11 In summary, Scott's current argument is raised for the first time on appeal and, as such, it is waived. ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995). In some situations, an appellate court may, in its discretion, address an issue raised for the first time on appeal where the issue is a question of law and concerns a matter of public policy. ***State v. Reitter***, 227 Wis. 2d 213, 238, 595 N.W.2d 646 (1999). But the appellate issue here is not one of public policy. More importantly, the issue is not one of law, but rather one of fact: did an informant provide the information and, if so, was the information sufficiently corroborated? Had Scott made this argument in the trial court, the evidence would have focused on that question. Instead, Scott took a different tack, arguing that Stevens' observations did not constitute reasonable suspicion under WIS. STAT. § 968.24. If we were to address the different question Scott raises on appeal, we would be forced to review the matter in an evidentiary vacuum. We cannot do that.

¶12 Therefore, we will address the temporary detention issue as the matter was raised and litigated in the trial court—whether the facts as observed and known to Stevens constituted reasonable suspicion under WIS. STAT. § 968.24.

¶13 Next, we address the probable cause issue. As noted, Leslie advised Stevens that he had taken a report a week earlier that implicated Scott in a battery and theft matter. On that basis, Leslie directed Stevens to arrest Scott.

¶14 On appeal, Scott complains that the evidence presented at the motion to suppress hearing failed to demonstrate probable cause regarding the prior battery and theft incident reported by Leslie. Specifically, Scott argues, "The

record is silent concerning any facts identifying who made this report or why this unidentified person believed the defendant had committed these offenses."

¶15 However, in the trial court Scott argued that Stevens did not have probable cause to arrest him because Stevens was not involved in the prior incident and did not otherwise have personal or sufficient knowledge of the facts regarding that matter. *In fact, Scott even objected on relevancy grounds when the State asked Leslie for the details of that report*. In support of his objection, Scott argued:

> Your honor, I'm going to object as to relevance. The issue here is what the officers that arrested Mr. Scott knew on February 6 of 1999. Officer Stevens indicated he was the officer that arrested Kinte Scott and he indicates basically that he knew nothing other than Officer Leslie told him to arrest Kinte Scott, so I don't believe that what the police report was about from Officer Leslie on a different occasion is relevant to this particular hearing.

¶16 Scott renewed this theme in his argument following the close of the evidence:

> It's because [Scott is] detained that Officer Leslie then sees him and then says to Officer Stevens that he is to arrest him, and even then Officer Stevens doesn't have enough information, I don't believe, to arrest him. He says Officer Leslie told him that he was involved in a battery and theft complaint. He's a suspect in a battery and a theft. He doesn't have any probable cause to arrest him because he doesn't know anything about that particular complaint. Only Officer Leslie knows that information. Officer Stevens doesn't have any information but he chooses to arrest him anyway.

¶17 Like the trial court, we interpret this argument to contend that an arresting officer must have personal or otherwise sufficient knowledge of the facts constituting probable cause for the arrest. That is not the law. As the trial court correctly observed, probable cause is assessed on the basis of the collective

knowledge of the police department. *See* ***State v. Cheers***, 102 Wis. 2d 367, 388-89, 306 N.W.2d 676 (1981). Therefore, the trial court concluded that Stevens could arrest Scott based on Leslie's directive.

¶18 On appeal, Scott changes the focus of his argument. His complaint is no longer that Stevens did not have personal or otherwise sufficient knowledge of the facts concerning the prior event. Rather, he now contends that the record fails to establish the reliability of the person or persons who reported the incident to Leslie. Not only is this an argument raised for the first time on appeal, but it also relates to a line of evidence which Scott sought to shut down in the trial court.[7]

¶19 As with the temporary detention issue, we hold that Scott's probable cause argument is waived, ***Rogers***, 196 Wis. 2d at 826, and that this is not an appropriate case to overlook such waiver. ***Reitter***, 227 Wis. 2d at 238. Again, the issue is not one of public policy and, more importantly, the question is not one of law, but of fact: the reliability and accuracy of the information provided by the person or persons reporting the event. Had Scott made this argument in the trial court, the evidence on this probable cause issue would presumably have been fully probed. Instead, Scott took the opposite tack. He argued that the presentation of such evidence was irrelevant. As with the probable cause issue, Scott asks us to address this issue in an evidentiary vacuum.

[7] We acknowledge that the trial court overruled the objection. And, ironically, it is Leslie's answer that provides grist for Scott's appellate argument challenging probable cause. But the fact remains that Scott's trial court argument was different than that made on appeal.

¶20 Therefore, we also conduct our review on this issue consistent with the way the issue was litigated in the trial court—whether Stevens' lack of knowledge regarding the prior incident rendered the arrest of Scott invalid.

Standard of Review

¶21 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

Temporary Detention

¶22 To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of illegal activity has taken or is taking place. In Wisconsin the reasonable suspicion standard has been codified in WIS. STAT. § 968.24. The question of whether the officer's suspicion was reasonable is a commonsense test: was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime? An inchoate and unparticularized suspicion or hunch will not suffice. However, the officer is not required to rule out the possibility of innocent behavior. ***Fields***, 2000 WI App 218 at ¶10.

¶23 In ***Adams v. Williams***, 407 U.S. 143 (1972), the United States Supreme Court stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and

> allow a crime to occur or a criminal to escape. On the contrary, ***Terry*** recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable in light of the facts known to the officer at the time.

Id. at 145-46.

¶24 In ***State v. Jackson***, 147 Wis. 2d 824, 434 N.W.2d 386 (1989), our supreme court said:

> Doubtless, many innocent explanations for Jackson's conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal…. We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.

Id. at 835.

¶25 An officer may rely on information received from another officer in making an investigatory stop. The inquiry in such a situation is whether the collective information among the officers is adequate to sustain the stop. *See* ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶26 When we measure the information imparted to Stevens by the dispatcher and the other officer already on the scene against Stevens' observations when he arrived on the scene, we have little difficulty concluding that Stevens could reasonably suspect that Scott might have been involved in the "shots fired" incident. The totality of the information imparted to Stevens was that a group of approximately seven black males was suspected in a shooting incident and that the group was eastbound on Prospect Street at Martin Luther King Drive. When

Stevens arrived at this location, he saw a group of approximately seven black males walking eastbound in a parking lot. Scott separated himself from the group when he saw Stevens and went to a pay phone.

¶27 We conclude that these facts constituted the degree of reasonable suspicion contemplated by WIS. STAT. § 968.24. We can say it no better than the trial court: "It's the progress of the group, the size of the group and the vicinity of the group near the shots fired call that is of significance to the Court." Under these suspicious circumstances, Stevens was authorized to temporarily detain Scott in order to resolve any ambiguity presented by the suspicious circumstances. In the words of ***Adams***, Stevens was not required "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." ***Adams***, 407 U.S. at 145-46.[8] We uphold the court's ruling.

Stevens' Authority to Arrest Scott

¶28 Scott also challenges his later arrest by Stevens based upon the directive from Leslie. As our discussion has revealed, Scott contended that the arrest was invalid because Stevens did not have personal or sufficient knowledge of the prior battery and theft incident. But, as we have noted, that is not the law. Probable cause is assessed on the basis of the collective knowledge of the police department as a unit. ***Cheers***, 102 Wis. 2d at 388-89. Therefore, the trial court correctly ruled that Stevens could lawfully arrest Scott at Leslie's directive.

[8] In the trial court, Scott compartmentalized his conduct, arguing that none of his separate acts (i.e., walking with a larger group, separating from the group, and stopping at a pay phone) raised a reasonable suspicion of any law violation. This argument is correct as far as it goes, but it does not go far enough. It overlooks that reasonable suspicion takes in the totality of the circumstances viewed by the officer, not just its discrete components viewed in isolation. In addition, Scott's argument overlooks the information imparted to Stevens that implicated the group in the "shots fired" episode.

Conclusion

¶29 We hold that Stevens had reasonable suspicion to temporarily detain Scott pursuant to WIS. STAT. § 968.24. We further hold that Stevens properly arrested Scott at Leslie's directive.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.